

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
D.P. MARSHALL, JR., JUDGE

DIVISION III

CACR06-897

14 March 2007

ENNIS OLIVER,  
APPELLANT

v.

AN APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT  
[CR 05-2465]

STATE OF ARKANSAS,  
APPELLEE

THE HONORABLE BARRY ALAN  
SIMS, JUDGE

AFFIRMED

Ennis Oliver appeals his conviction for the rape of his girlfriend's fourteen-year-old daughter, P.T. Oliver argues that the State presented insufficient evidence to convict him and that we should strictly construe the rape statute. We affirm because substantial evidence supports Oliver's conviction. We do not address his argument about statutory construction because he did not make it to the circuit court.

To convict Oliver of rape, the State had to prove that he engaged in sexual intercourse or deviate sexual activity with P.T. and that P.T. was incapable of consent because she was physically helpless or mentally incapacitated. Ark. Code Ann. § 5-

14-103(a)(2)(A) & (C) (Repl. 2006). Under the statute, P.T. was mentally incapacitated if she was temporarily incapable of appreciating or controlling her conduct as a result of the influence of a controlled or intoxicating substance, which was administered to her without her consent or that rendered her unaware a sexual act was occurring. Ark. Code Ann. § 5-14-101(5) (Repl. 2006). Alternatively, P.T. was physically helpless if she was unconscious, physically unable to communicate lack of consent, or rendered unaware the sexual act was occurring. Ark. Code Ann. § 5-14-101(6) (Repl. 2006).

We have construed the statutory term “physically helpless.” In *Marshall v. State*, 94 Ark. App. 34, \_\_, \_\_ S.W.3d \_\_, \_\_ (January 18, 2006), we held that a victim was physically helpless where, after drinking too much alcohol, she was at times unconscious, inebriated, “out of it,” and unable to stand, walk, or sit on the couch without falling off. Our construction of the term “physically helpless” has become part of the statute. *Burns v. Burns*, 312 Ark. 61, 65, 847 S.W.2d 23, 26 (1993).

At trial, Oliver admitted that he had sexual intercourse with P.T. His contention was that P.T. forced herself on him while he was in a deep sleep induced by medication. On appeal, Oliver argues that P.T. was not mentally incapacitated or physically helpless when the intercourse occurred.

P.T. testified that on the night of the alleged rape, she took Elavil, which makes

her drowsy, and went to sleep in her mother's bed. She did not remember anything until she woke up the next morning, went to the bathroom, and discovered that her underwear was wet and twisted. When she returned to the bedroom, she noticed Oliver asleep in the bed. Twelve weeks later, P.T. went to the doctor and learned she was pregnant. DNA tests revealed with 99.99% certainty that Oliver was the biological father of P.T.'s unborn child. P.T.'s physician testified that Elavil causes sedation, especially when taken intermittently, as P.T. took the medication. As in *Marshall*, substantial evidence exists that the victim was physically helpless at the time sexual intercourse occurred. We therefore affirm Oliver's conviction for rape.

GLOVER and BAKER, JJ., agree.